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Supreme Court, U.S.
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No. 91-627

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

STATE OF ARIZONA,

Petitioner,

-vs-

VOATRESS MULLEN, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS, DIVISION ONE

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where the trial court record demonstrates that the officer approached the respondent at a bus stop without reasonable suspicion of criminal activity and the prosecutor stipulates that the officer demanded compliance with his request that identification be produced, whether the trial court erred in its judgment that the Fourth Amendment was violated.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Voatress Mullen, Jr., through undersigned counsel, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Arizona Court of Appeals in this case. That opinion is reported at ____ Ariz. ____, 812 P.2d 106.

STATEMENT

1. Respondent, Voatress Mullen, Jr., was seated at a bus stop awaiting the arrival of a bus in Phoenix, Arizona, in the afternoon of May 16, 1988. App. 2. Phoenix police officer David Leeper drove by in a marked patrol car. He concluded that respondent was watching the police car and decided to contact him. App. 7. He approached on foot. Id.

The prosecutor stipulated that Officer Leeper then demanded that respondent comply with his request to produce identification. See infra section 2. Respondent then gave the officer his driver's license. The officer recorded respondent's name and date of birth. App. 8. He asked respondent what he had in his carrying bag. Id. Respondent allowed the officer to examine the bag. Id. When the bus arrived, the officer returned respondent's license and permitted him to board the bus. App. 8. After the bus departed, the officer ran a computer search and found an outstanding warrant for respondent. App. 2. He followed the bus to the next stop. Id. He boarded the bus and placed respondent under arrest based on the warrant. Id. The officer searched respondent incident to the arrest and found various items of drug paraphernalia and a small quantity of illegal drugs. App. 2.

2. Respondent filed a Motion to Suppress and a supporting Memorandum of Points and Authorities in the trial court. App. 1-5. A partial transcript of Officer Leeper's preliminary hearing testimony was attached to the motion. App. 6-11. The Motion to Suppress requested an evidentiary hearing. App. 1. The

section of the Motion to Suppress labeled "Statement of Facts" alleged that the officer had demanded identification from the respondent. App. 2.

The State filed a Response to Motion to Suppress, which stipulated that the facts set forth in respondent's Memorandum of Points and Authorities were accurate. App. 12. The State contended that no evidentiary hearing was required. Id. The State's Response to Motion to Suppress states:

> COMES NOW the County Attorney, by and through counsel undersigned, and responds to defendant's Motion to Suppress as follows:
>
> I. FACTS:
>
> For purposes of the determination of this motion, the State stipulates that the facts as set forth in defendant's Memorandum of Points and Authorities and as illustrated by the portions of the Preliminary Hearing transcript attached thereto are accurate. The State does not believe that this matter requires an evidentiary hearing, for the reasons that the facts as stated in defendant's Memorandum, or as elaborated upon herein, should be sufficient for the Court to apply the law and determine the appropriate resolution of the issue at bar.

Id.

During the hearing on the Motion to Suppress the trial court confirmed that the State and respondent were stipulating to the accuracy of the facts set forth in the Motion to Suppress. (See Petition for Writ of Certiorari to Arizona Court of Appeal, Division One, App. 19). The officer testified during the Motion to Suppress hearing that he had asked respondent for identification. Id. at 26-27, 30. His preliminary hearing testimony also was that he had asked for identification. App. 8.

During the Motion to Suppress hearing, respondent's counsel contended that the officer had demanded identification. Id. at App. 37.

3. The trial court granted respondent's Motion to Suppress. See Petition for Writ of Certiorari to the Arizona Court of Appeals, Division One, App. 44. Although the trial court wrote no opinion and made no express findings of fact, the court did state: "Police do not have the right to stop someone and say, 'Let me see your identification!'" Id. at 43. The trial judge asked the prosecutor: "What is the officer's articulable reason for demanding identification from somebody waiting for a bus?" Id., at App. 41.

The trial court was also of the opinion that the police could not "stop at every bus stop and request any person to display identification," at least not when the stop was racially motivated. Id. at 42. The court suggested that respondent's race might have prompted the encounter. Id. at 42-43.

4. The Arizona Court of Appeals affirmed the suppression order. The Court of Appeals stated that officers could not ask for identification with no founded suspicion of criminal activity. The court concluded that respondent was detained and that the investigatory detention violated the Fourth Amendment.

5. The Arizona Supreme Court denied the State's petition for review without opinion on July 11, 1991.

SUMMARY OF ARGUMENT

Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual and asking a few questions. Florida v. Bostick, 501 U.S. _____, 115 L.Ed.2d 389, 111 S.Ct. 2382 (1991). Such an encounter is consensual and may occur even without the police having reasonable suspicion of criminal activity. See id. However, if the officer without reasonable suspicion demands that identification be produced, the encounter loses its consensual nature and the Fourth Amendment is violated. See id. This Court has made it clear that without reasonable suspicion the police may not demand cooperation and that "consent" that is the product of official intimidation or harassment is not consent. See id.

The State stipulated that the officer demanded identification from respondent. This demand was an unreasonable seizure and violated the Fourth Amendment. See id.

The burden was on the State to prove that the evidence was lawfully obtained. See 17 A.R.S. Rules of Crim.Proc. Rule 16.2(b); Bumper v. North Carolina, 391 U.S. 543 (1968). The prosecution did not meet its burden. The stipulation entered by the State could have influenced the trial judge's decision to find a Fourth Amendment violation. The trial court was correct in stating that the: "Police do not have the right to stop someone and say, 'Let me see your identification!'"

The parties stipulated before the trial court to facts which support the judgment below.

ARGUMENT

I. THE PROSECUTION STIPULATED THAT THE OFFICER DEMANDED COMPLIANCE WITH HIS REQUEST TO PRODUCE IDENTIFICATION.

This Court has made it clear that the Fourth Amendment is not violated whenever a police officer approaches a person and merely asks a few questions. If a reasonable person would feel free to disregard the officer and go about his business, the encounter is not considered an unreasonable seizure. Florida v. Bostick, 501 U.S. _____, 115 L.Ed.2d 389, 111 S.Ct. 2382 (1991). The encounter is constitutionally permitted even if the police are without reasonable suspicion of criminal activity. See id. However, the police may not demand "voluntary" cooperation. This Court stated that "consent" that is the product of official intimidation or harassment is not consent at all. See id.

Respondent submits that a police demand for identification communicates to a reasonable person that he is not free to ignore the police presence and go about his business. A reasonable person would not decline a police demand for identification. Law enforcement officers when they have no articulable reason to suspect criminal activity are not justified in demanding that an individual produce identification or submit to a search or respond to their questions.

The facts of this case clearly indicate that the police had no articulable suspicion of criminal activity when respondent was approached. The facts of this case as evidenced by the stipulation entered by the prosecutor indicate that Officer Leeper demanded

identification from respondent.

In Arizona, one who stipulates to certain facts is foreclosed from repudiating them on appeal. Wolf Corporation v. Louis, 11 Ariz. App. 352, 464 P.2d 672 (1970). A party may not complain on appeal that his choice of words in a stipulation did not state what he contends on appeal he really meant to say. See id., at 355, 464 P.2d at 675. Parties are bound by their stipulations. Pulliam v. Pulliam, 139 Ariz. 343, 678 P.2d 528 (1984). Stipulations made by previous counsel do not evaporate upon the retention of a new attorney. See id., at 346, 678 P.2d at 531. In Gangadean v. Flori Investment Company, 106 Ariz. 245, 248, 474 P.2d 1006, 1009 (1970), the Arizona Supreme Court stated: "Facts stipulated to by counsel are conclusive throughout the litigation and binding on the parties unless, upon appropriate and timely motion and for good cause shown, the parties are relieved therefrom."

II. THE PROSECUTION FAILED TO MEET ITS BURDEN TO PROVE THAT THE RESPONDENT CONSENTED TO THE PRODUCTION OF IDENTIFICATION.

In Bumper v. North Carolina, 391 U.S. 543 (1968), this Court stated that when the prosecution wishes to rely upon consent to justify the lawfulness of a search, it has the burden to prove that the consent was freely given. This Court stated that the prosecution's burden of proof: "cannot be discharged by showing no more than acquiescence to a claim of lawful authority." See id., at 548-549.

Under the Arizona Rules of Criminal Procedure the prosecutor had the burden of proving by a preponderance of the evidence to the

trial judge that the evidence was lawfully obtained. 17 A.R.S. Rules of Crim.Proc. Rule 16.2(b) states:

> b. Burden of Proof on Pretrial Motions to Suppress Evidence. The prosecutor shall have the burden of proving, by a preponderance of the evidence, the lawfulness in all respects of the acquisition of all evidence which he will use at trial. However, whenever the defense is entitled under Rule 15 to discover the circumstances surrounding the taking of any evidence by confession, or search and seizure, or defense counsel was present at the taking, or the evidence was obtained pursuant to a valid search warrant, the prosecutor's burden of proof shall arise only after the defendant has come forward with evidence of specific circumstances which establish a prima facie case that the evidence taken should be suppressed.

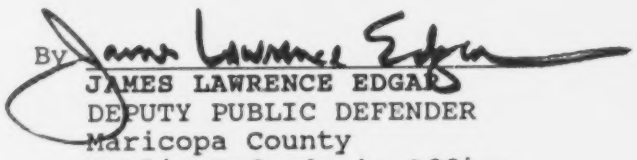
The trial judge observed the officer's testimony. The trial judge was entitled to discount the officer's testimony in its entirety or to rely on it heavily. The trial judge's comments made before granting the Motion to Suppress strongly suggest that he concluded that Officer Leeper had demanded identification. The stipulation entered by the State might have been a factor in the judge's decision.

Absent a clear abuse of discretion, Arizona appellate courts will not overrule a trial court's ruling on a Motion to Suppress. State v. Vandeveer, 23 Ariz. App. 331, 533 P.2d 91 (1975). Given the stipulation entered by the prosecutor, it is not clear that the trial court abused its discretion. It is respectfully submitted that the prosecution failed to meet its burden to prove that Officer Leeper did not demand identification from the respondent.

CONCLUSION

Since only questions of evidence and factual findings regarding whether the officer demanded identification from the respondent are involved, and the parties stipulated before the trial court to facts which clearly support the judgment below, respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,



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APPENDICES

App. 1
Appendix A

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1988 JUL 13 PM 2:22

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. VOATRESS MULLEN, JR. Defendant.	No. CR 88-05777 MOTION TO SUPPRESS (Oral Argument Requested) (Evidentiary Hearing Requested) (Assigned to the Honorable I. Sylvan Brown)

DEFENDANT, VOATRESS MULLEN, JR., by and through counsel undersigned, and pursuant to Rule 16.5, Arizona Rules of Criminal Procedure, hereby moves this Court to suppress all evidence seized pursuant to the unlawful search of his person and property which was conducted by a Phoenix police officer on May 16, 1988. The basis for this motion is that the initial contact of the defendant was illegal; therefore, the subsequent search of Mr. Mullen was illegal. This motion is based on the attached Memorandum of Points and Authorities, and the attached excerpts of the preliminary hearing transcript in this case, herein incorporated by reference.

Respectfully submitted this 13 day of July, 1988.

DEAN W. TREBESCH
MARICOPA COUNTY PUBLIC DEFENDER

By Deborah Cole-Williams
DEBORAH L. COLE-WILLIAMS
Deputy Public Defender
Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

Statement of Facts

On May 16, 1988, VOATRESS MULLEN was sitting at a bus stop on Seventh Avenue, north of Thomas Road, waiting for a bus. [Transcript, page 4.] He was periodically looking up and down the street for his bus. A police officer drove by, in a marked patrol car, and decided that MR. MULLEN was watching him. [Transcript, page 5.] For some reason he found this quite suspicious, so the officer turned his car around and returned to MR. MULLEN'S bus stop. [Transcript, page 5.] The officer "was curious," so he demanded identification and wanted to know what MR. MULLEN was doing and what he had inside his backpack. [Transcript, pages 5-6.] MR. MULLEN complied, and said that he was waiting for a bus. [Transcript, page 6.]

MR. MULLEN's bus arrived and he got on board. [Transcript, page 6.] After MR. MULLEN left the officer ran a computer warrant search and found an outstanding warrant for MR. MULLEN. [Transcript, pages 6-7.] He then followed the bus to the next stop and pulled MR. MULLEN off the bus. [Transcript, pages 7-8.] MR. MULLEN was placed under arrest and searched. [Transcript, page 8.] During a search of the backpack -- the one which had so piqued the officer's curiosity during their initial contact -- various items of "drug paraphernalia" and a minute quantity of white powder were found. [Transcript, page 8.]

Statement of Law

Police officers can not stop citizens on the street unless they have a reasonable and articulable suspicion that criminal activity is afoot. Terry v. Ohio, 88 S.Ct. 1868, 392 U.S. 1, 20 L. Ed. 2d 899 (1968); State v. Hein, 138 Ariz. 360, 674 P.2d 1358 (1983). To justify a stop the police must point to specific and articulable facts of which they were aware before the stop was made. State v. Valenzuela, 121 Ariz. 274, 589 P.2d 1306 (1979). There must,

be more than mere suspicion. State v. Petersen, 124 Ariz. 336, 604 P.2d 267 (App. 1979).

Even a mere investigatory stop must be based on articulable facts which demonstrate a reasonable suspicion that the individual was involved in criminal activity. United States v. Cortez, 101 S.Ct. 690, 449 U.S. 411, 66 L. Ed. 2d 621 (1981), cert. den. 455 U.S. 923 102 S.Ct. 1281, 71 L. Ed. 2d 464, reh. den. 102 S.Ct. 1648, 455 U.S. 1000, 871 L. Ed. 2d 877; State v. Master, 127 Ariz. 610, 619 P.2d 482 (1980). In Cortez, the United States Supreme Court held that the legality of an investigatory stop must be examined through a two prong test of the totality of the circumstances. The first prong assesses all of the circumstances of the stop, and allows for some subjectivity on the part of the police officer together with objective factors such as information from police reports, statistics, and the nature of the crime being investigated. Secondly, once this assessment is made, there must be a particularized and articulable suspicion that the particular individual being stopped is engaged in criminal activity or wrongdoing.

That test was applied in Arizona by State v. Graciano, 134 Ariz. 35, 653 P.2d 683 (1982), which involved the stop of an Hispanic-looking male who was lawfully driving a vehicle on the highway. There was nothing improper about his driving. No traffic violation or other criminal activity had been observed. The officer admitted that his sole purpose for making the stop was to determine whether the vehicle was stolen. That stop was held to be illegal because it could not be justified by the State under the Cortez standard, even though subsequent to the stop the officer learned that the vehicle was stolen. Therefore, the Arizona Supreme Court held that the first prong of the test — the assessment of all the circumstances — does not include a weighing of the officer's "unparticularized suspicion" or hunches about a suspect or situation.

Brown v. Texas, 99 S.Ct. 2637, 443 U.S. 47, 61 L. Ed. 2d 357 (1979), also supports MR. MULLEN's position. There, police oficers saw Brown and another unidentified male walk toward each other in an alleyway, known as an area of high drug activity, and then immediately separate. The officers approached Brown to investigate. However, the officers had no articulable suspicion of any criminal activity beyond what they had observed. The officers requested identification from Brown, but he refused. Brown was then arrested for violation of a local Texas ordinance requiring that identification be given on demand. His conviction was reversed by the United States Supreme Court because the stop was improper. The arresting officer testified that Brown "looked suspicious" and the only reason for stopping Brown was to ascertain his identity. The officer did not have an articulable suspicion, based on objective facts, that Brown was involved in any criminal activity. The Court held that the Fourth Amendment does not allow a police officer, without a specific basis for believing that the individual is involved in criminal activity, to stop that individual and demand identification.

The stop at issue here cannot be justified under Cortez or Graciano. MR. MULLEN was sitting at a bus stop waiting for a bus. That activity is neither suspicious nor criminal. Indeed, the use of the transit facilities is in fact invited and encouraged by the Phoenix city government and the transit authorities. The officer stated in his report that he believed MR. MULLEN was watching him. However, the officer conceded that Mr. Mullen was not engaged in any criminal activity. The stop was improper; therefore, the police officer had no legal justification to request identification from MR. MULLEN and no legal justification to inquire into the contents of MR. MULLEN's backpack. Accordingly, it follows that the subsequent conduct of the officer, and his search of MR. MULLLEN which revealed the illegal paraphernalia and drugs, is void under Wong Sun v. U.S., 83 S.Ct. 407, 371 U.S. 471, 9 L. Ed. 2d 441 (1963).

The initial contact with MR. MULLEN was illegal. Therefore, the subsequent arrest and search of MR. MULLEN was improper. For that reason, all evidence seized pursuant to the search of MR. MULLEN must be suppressed, and the charges should be dismissed as the result of the officer's illegal detention of MR. MULLEN.

Respectfully submitted this 13 day of July, 1988.

DEAN W. TREBESCH
MARICOPA COUNTY PUBLIC DEFENDER

By Deborah Cole-Williams
DEBORAH L. COLE-WILLIAMS
Deputy Public Defender
Attorney for Defendant

Copy of the foregoing motion
mailed/delivered this 13
day of July, 1988 to:

HON. I. SYLVAN BROWN
Judge of the Superior Court

MR. CHARLES PYEATTE
Deputy County Attorney

By
DEBORAH L. COLE-WILLIAMS
Deputy Public Defender

13d

were you in the vicinity of 2900 North 7th Avenue?

A Yes, I was.

Q Is 2900 North 7th Avenue in the City of Phoenix, County of Maricopa, State of Arizona?

A Yes, it is.

Q What were you doing at that location and at that time?

A Basically routine patrol.

Q And did you, while you were on patrol, notice anything unusual?

A I was just south of 7th Avenue and Thomas traveling northbound when I observed the defendant sitting at the bus stop.

Q You say you observed the defendant, the gentleman who was seated at the bus stop. Was that also the gentleman who is in the courtroom today?

A Yes, it is.

Q Could you point out who that gentleman is?

A It's the subject with the blue shirt on with a moustache, black curly hair.

MR. WINTER: Your Honor, may the record reflect the officer has positively identified the defendant?

THE COURT: It may.

BY MR. WINTER:

Q And what did you notice the defendant doing?

A He was staring at me as I approached him from the south of his location, and as I got parallel with him, he was watching me, and as I passed him, he leaned forward passed the bus stop getting actually out of his seat watching me travel northbound.

Q I see. What did you do next, Officer?

A Well, I watched him out of my rear view mirror until I approached Osborn, which is approximately half a mile north, and he sat back. In other words, he sat back up against the seat.

MR. MCGILLICUDDY: Excuse me, Judge --

BY MR. WINTER:

Q Please continue, Officer. You saw the subject lean back in his seat?

A At that time his activity gave me -- I felt was suspicious enough for me to at least come back and talk to him. So I went eastbound up to Third Avenue and I came up to Valley National Bank and approached him on foot.

Q Did you in fact speak to the defendant?

A Yes, I did.

Q And could you tell me what the subject of that conversation was or what you did?

A Basic conversation. I identified myself, and I was curious -- first of all while he was watching me as I drove northbound he stated he was curious if I was

using my vehicle Modac computer. I asked him for identification and asked him basically what was he doing in the area.

Q And what did he tell you?

A He stated that he was over at Encanto Park. It was a park just west of Thomas and 7th Avenue and that he was, you know, on his way home or from work. I can't recall.

Q I see. And then what happened?

A He gave me his drivers' license. I jotted down his name and his date of birth. He was carrying a -- I believe a blue carrying bag, and I asked him what was he carrying in his bag and he said, "Nothing, just some clothes." And I asked him if he would mind showing me. He agreed to show me. I looked in. I saw a pair of sweat clothes on top.

Then at that point the city bus pulled up. He didn't commit no crime that I was aware of. So I told him okay. I gave back his drivers' license and allowed him to enter the bus.

Q I see. What did you do next, Officer?

A Well, after he entered the bus, I walked back to my patrol car and I ran a routine warrant check under the name and date of birth he gave me, and it came back --

MR. MCGILLICUDDY: Objection; hearsay; no foundation.

MR. WINTER: Your Honor, I don't understand necessarily what defendant's objection is. We're asking what this officer did. He clearly is commenting on what he's doing. If the hearsay objection has to do with whoever entered the information into the computer in the first place, hearsay is allowable in this stage under Rule Five of the criminal procedure.

THE COURT: Well, for the purpose of preliminary hearing, I'll allow it.

MR. MCGILLICUDDY: May I complete my objection, Judge? There has been no foundation as to who the declarant was and whether that declarant would be available for testimony in Superior Court, and until the State can establish that, hearsay's not admissible.

THE COURT: Very well, the objection is still overruled.

MR. WINTER: Thank you, Your Honor.

Q Please tell me what happened after you ran this computer check?

A When I ran the computer check, it came back with a Mullen, Voatress. It was a warrant. So I entered my patrol car, went northbound, the bus was stopped at 7th Avenue and Osborn just north picking up subjects entering

the bus.

At that time I also entered the bus on foot and advised the driver I needed to speak to the subject that he picked up back on 7th Avenue and Thomas. He agreed. I asked Mr. Mullen to exit the bus with me, and at that time I placed him under arrest for suspicion on the warrant charge.

Q And did you do anything after that, Officer?

A Yes, I placed him back in my -- well, I searched him, you know. I placed him in the back of my patrol car, and I drove over to 7th Avenue and Osborn on the northeast corner there. I used the phone to verify the warrants, and while doing so, I searched his property. Upon searching his property, I found a scale, miniature scale, which is known to me to be used by --

MR. MCGILLICUDDY: Objection. Without foundation, there's no basis for his opinion as what the scale is or should be used for.

THE COURT: Sustained.

BY MR. WINTER:

Q Officer, have you made other arrests for narcotic drugs?

A Yes, I have.

Q How many? Do you have any idea?

A At least a dozen.

Q Have any of those arrests involved subjects

from the jail and was back and Oak is the beginning of my precinct and 7th Avenue. So basically it was just basically my precinct area.

Q I take it from what you just said there was nothing of a criminal nature going on in the vicinity of where you saw Mr. Mullen?

A At that particular moment or in the past? Not at that moment, no.

Q And you weren't responding to any call involving Mr. Mullen?

A No, I was not.

Q Basically all you saw was Mr. Mullen sitting at a bus stop; correct?

A Yes.

Q And he was there by himself?

A Yes.

Q And you were on patrol by yourself?

A Yes.

Q And the only thing you saw him do was looking at you as you drove by?

MR. WINTER: Your Honor, I'm going to object to this line of questioning as to irrelevant as to the issue of probable cause to possession of narcotics drugs and drug paraphernalia.

It is obviously establishing or going into a

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. VOATRESS MULLEN, JR., Defendant.	NO. CR 88-05777 RESPONSE TO MOTION TO SUPPRESS (Assigned to the Honorable I. Sylvan Brown)

COMES NOW the County Attorney, by and through counsel undersigned, and responds to defendant's Motion to Suppress as follows:

I. FACTS:

For purposes of the determination of this motion, the State stipulates that the facts as set forth in defendant's Memorandum of Points and Authorities and as illustrated by the portions of the Preliminary Hearing transcript attached thereto are accurate. The State does not believe that this matter requires an evidentiary hearing, for the reasons that the facts as stated in defendant's Memorandum, or as elaborated upon herein, should be sufficient for the Court to apply the law and determine the appropriate resolution of the issue at bar.

According to the police report prepared by Phoenix Police Officer, David Leeper, and the testimony he gave at the preliminary hearing (Transcript, page 5), Officer Leeper's attention was drawn to Mr. Mullen because, while sitting on a bus bench as the officer drove by in his police car, Mr. Mullen was intently staring at the officer. Officer Leeper turned around and returned to the bus stop, identified himself as a police officer when making contact with the defendant, and begin to ask defendant some questions about why the defendant was paying attention to his passing patrol car. The rest of the conversation is as indicated in the statement of facts in defendant's Memorandum in support of the motion and the attached portions of the Transcript. During this contact between Officer Leeper and the defendant, at no time did the officer draw his weapon, issue any commands to Mr. Mullen, or prevent him from boarding a city bus and leaving the location of the initial contact.

II. LAW:

Insofar as the defendant has cited in his Memorandum, the applicable law related to a "stop" or "investigatory stop" of a citizen, that law is correctly cited. However, insofar as the defendant asserts that the contact between Officer Leeper and Mr. Mullen fell within the definition of "stop"--in other words, a detention triggering the Fourth Amendment protections--the law is incorrectly applied in this case. Specifically, the claim in the last paragraph on page four of defendant's Memorandum that the officer had to have "legal justification" to request

identification from the defendant or to inquire into the contents of his backpack is not an accurate statement of the law.

Essentially, the defendant would have this Court believe and rule that any contact between a uniformed peace officer and a citizen constitutes a "detention" for Fourth Amendment purposes. The Supreme Court of the United States, in a line of cases, has clearly stated that this is not so. In Terry v. Ohio, 392 U.S. 1 (1968), the Court Supreme Court noted:

> Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred. 392 U.S. at page 19, note 16.

Twelve years later, the United States Supreme Court in United States v. Mendenhall, 446 U.S. 544, 554 (1980), expanded on this test by adding the phrase "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave" is there a Fourth Amendment seizure. Almost identical language was adopted in defining what constitutes an arrest as perceived by the Arizona Supreme Court in State v. Winegar, 147 Ariz. 440, 449, 711 P.2d 579 (1985).

In Florida v. Royer, 460 U.S. 491, 501-502 (1983), agents at an airport spotted an individual who fit a "profile" of a drug smuggler. The Court noted that asking the defendant for his ticket and his driver's license to identify himself was permissible activity. It was only when the narcotics agents took his ticket away from him, preventing him from leaving the airport, and required

him to accompanying them to an interrogation room that he was effectively detained for Fourth Amendment purposes. This point was emphasized in a case shortly after Royer in which the Court said: ". . . our recent decision in Royer, supra, plainly implies that interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." INS v. Delgado, 466 U.S. 210, 80 L.Ed.2d 247, 255, 104 Sup.Ct. 1758 (1984).

In Delgado, agents of the United States Immigration and Naturalization Service were conducting what was termed a "factory survey." That means that the agents would enter a factory where they believe illegal aliens were employed, some agents positioning themselves near the exits, while other agents moved systematically through the factory, approaching employees and, after identifying themselves, asking the employees from one to three questions relating to their citizenship. During this time, although the INS agents displayed badges, carried walkie talkies, and were armed, the employees were free to continue their work and walk around within the factory, and the agents did not, at any point, point their weapons at any of the people they contacted.

The critical difference between this kind of police contact and that which occurred in Brown v. Texas, 443 U.S. 47 (1979), relied upon by defendant in his Memorandum, is that when Brown refused to give his identity to the officers, he was detained for the purpose of determining his identity.

In an effort to draw the distinction between Brown and the other comments made in its other cases, the Supreme Court gave the following explanation:

> Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. But if the person refuses to answer and the police take additional steps--such as those taken in Brown--to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure. 80 L.Ed.2d at 255.

Mendenhall and Delgado have both been relied upon as recently as last month. Michigan v. Chesternut, 43 Crim. L. Rptr. 3077 (June 13, 1988).

The essence of defendant's argument in his Motion to Suppress is contained in the first sentence on page 5 of his motion: "The initial contact with Mr. Mullen was illegal." Seen from the viewpoint of a person who knows he is a fugitive from justice, any contact with a police officer may seem fearful or intimidating, but that viewpoint is not the legal test of such encounters. Throughout the cases cited from the United States Supreme as well as the Arizona Supreme Court in Winegar, the theme has remained the same: The essential question is whether, based on an objective view of the totality of the circumstances, the person questioned was "free to leave." That question is easily resolved in this case because, in fact, Officer Leeper did allow Mr. Mullen to board a city bus and proceed down the road. Mr. Mullen was not again contacted until the officer had determined that there were outstanding warrants for his arrest.

III. CONCLUSION:

Until such time as a citizen's liberty is interfered with by peace officer, the Fourth Amendment does not come into play. Viewing the circumstances of the initial contact between Officer Leeper and Mr. Mullen, there are no indications that the officer was employing any coercive methods to secure the information. Therefore, that contact was consensual, regardless of what emotions the defendant may have been experiencing. The simple fact that Officer Leeper permitted Mr. Mullen to board a bus and continue on his way discredits any argument that he was "detained." Therefore, all the cases cited by the defendant which are based upon a "stop" are inapplicable in this case. No use of police power or detention occurred until Office Leeper, aware that there were outstanding warrants for Mr. Mullen's arrest, boarded the bus and took him off it and into custody.

Respectfully submitted this 18th day of July, 1988.

THOMAS E. COLLINS
MARICOPA COUNTY ATTORNEY

BY Charles Pyeatte
Charles Pyeatte
Deputy County Attorney

Copy of the foregoing mailed/
delivered this 18th day of
July, 1988, to:

The Honorable I. Sylvan Brown
Judge of the Superior Court

Deborah L. Cole-Williams
Deputy Public Defender
132 South Central, Second Floor
Phoenix, Arizona 85004

BY _____
Charles Pyeatte
Deputy County Attorney

CP:bp7.18.1

IN THE Cent 1-J App. Court 19 - Appendix D

Ch: POND CHE
FWDO C6

STATE OF ARIZONA, COUNTY OF MARICOPA

PRETRIAL SERVICES AGENCY BACKGROUND INFORMATION

CR 88-05777 Aka

Defendant is advised he is not required to answer any questions if he feels the answers might be harmful to himself in this or future proceedings.

Book No. 023781

IDENTIFICATION & RESIDENCE: Sex M Ethnicity B Age 34 DOB 7-14-53

Name: Mullen, Dortress Jr. Phone:

Present address: Louanga Inn City: How long: 5-16-88

With whom: Relation:

Alternate address: 505 W Mulberry # City: PHX How long: 2 mo

Phone: 230-8737 With whom: Carl Murphy Relation: Friend

Previous address: City: How long:

Cont. time in AZ: Total time in AZ: Last time left AZ:

Where did you go: How long:

Birth State: Calif Citizenry:

MARITAL STATUS: S M Sep. Div. Com-Law Wid. How long: 15 yrs

Child support (no.) 3 Ages: 4y, 7y, 13y

Immediate family in Phoenix area you have contact with:

wife Children

EMPLOYMENT: Employed Unemployed Disabled Retired How long:

Present employer: Student West Wind Academy - Just No full p/t How long:

Address: When: Type of work:

Prior employer: How long:

Present student status: Monday Therapy Grade completed: 12+

CRIMINAL RECORD: (Convictions in AZ and other states and countries)

Charge	Date	Sentence	State

Presently on probation/parole: Officer:

Expires: Past Juvenile: Terminated:

RECORD OF APPEARANCE: Prior FTA: Date: 4-11-88 Court:

Charge: Dom Viol

Prior release on own recognizance or bail:

Date	Charge	Amount	Sentence

A 880113C
1A - 516

PRESENTLY OUT ON BOND/OR: Charge: DOM Viol Court: Sup Ct A

Bond/OR: 37250 Release date: Incustody Pending date: 6-7-88 A

Drug, alcohol, physical or mental treatment last 6 months:

Residence upon release: SAME

Phone: With whom:

OTHER INFORMATION:

Carl 230-8737

(5)

Public Defender